IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Lynchburg Division

SYLVIA LEEDS	)	
	)	
Plaintiff	)	
	)	
v.	)	**Civil Action No. 6:09cv00061**
	)	
JOHN DOE ONE, *ET. AL.*	)	
	)	
Defendants	)	

PLAINTIFF'S NOTICE OF ITS INTENTION TO WITHDRAW ITS MOTION TO FILE AN AMENDED COMPLAINT AND MOTION FOR LEAVE TO SUBSTITUTE CALVIN WHITT FOR JOHN DOE TWO AND TO AMEND ITS COMPLAINT

COMES NOW the plaintiff, Sylvia Leeds, by counsel, pursuant to Rule 15(a)(2) of the Federal Rules of Civil Procedure and Title II, Rule 11(c)(2) of the Local Rules of the United States District Court for the Western District of Virginia, and withdraws her previously filed Motion to Amend and moves the Court for leave to amend her Complaint and to substitute Calvin Whitt for John Doe Two as a party defendant, in support of which she states as follows:

On October 14, 2009, the plaintiff, Sylvia Leeds (hereinafter "Leeds") instituted this action against John Doe One[1], John Doe Two, Pendum, LLC ("Pendum")and The Kroger Co. ("Kroger") in the Circuit Court for the City of Lynchburg, Virginia. On November 13,

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[1] John Doe One was dismissed by Order entered March 3, 2010 (DE 23).

2009, both Pendum and Kroger removed the case to this Court. (*See, generally*, Notice of Removal [DE 1]). In her Complaint, Leeds alleged that on August 5, 2009, she suffered injuries when a boxed patio umbrella (hereinafter "the umbrella") fell on her while she was in Kroger Store No. 408 in Lynchburg, Virginia (Comp. ¶8). Leeds further alleged that the umbrella fell on her because (I) an unidentified Kroger employee (John Doe One) negligently leaned the umbrella against an unsecured magazine rack and (ii) because an unidentified Pendum employee, while servicing an adjacent ATM machine, caused the door of the machine to strike the magazine rack, thereby causing the umbrella to fall and hit Leeds (*Id.*¶¶ 7-8).

Pursuant to the Court's Pre-trial Order [DE 15] and the Pre-trial Plan of the parties [DE 18], the parties engaged in extensive discovery related to the Leeds claim. On April 20, 2010, Leeds deposed Pendum's employee, Calvin Whitt ("Whitt") and two Kroger employees, James Morris ("Morris") and Carly Burrage ("Burrage"). After these depositions, Leeds determined that she could not produce sufficient evidence to pursue her claim against Pendum; and Leeds and Pendum filed a Joint Motion for Voluntary Dismissal [DE 31]. Briefs were filed; and a hearing on the Motion held on May 19, 2010, at the conclusion of which, the Joint Motion was granted and Pendum was dismissed as a party defendant [DE 44]. No such Order was entered with respect to John Doe Two.

The facts adduced by Leeds during discovery, however, portray a somewhat different scenario leading up to the events of August 5, 2009, than that set forth in her Complaint. While Whitt testified that the umbrella was leaning against the magazine rack as alleged in the Complaint (Whitt Dep., page 22, line 25-page 23, line 5), Morris, who was Kroger's store manager at the time, testified that the umbrella was placed in an upright leaning position on its end against the customer service desk by Ashley Saunders, another Kroger employee (Morris Dep., page 22, lines 6-16), that it was leaning in this position against the customer service desk for a period of approximately three hours (Morris Dep., page 24, line 21-page 25, line 3) and that the box containing the umbrella was square, measuring 7.28'' x 7.28" x 59.45" (Morris Dep. Page 29, lines 18-19).

Burrage, who was the Kroger employee assisting Leeds at the customer service desk, testified that she observed the umbrella at the customer service desk (Burrage Dep., page 10, lines 9-10) and noted that the top of the box containing the umbrella extended approximately 7 inches above the top of the raised portion of the customer service desk counter (Burrage Dep., page 10, lines 19-24).

Inasmuch as Pendum is no longer a party defendant and John Doe Two has now been identified as Whitt, and inasmuch as it has now been determined how and by whom the umbrella was placed at the customer service desk, it is necessary for the plaintiff to substitute Calvin Whitt in the place and stead of John Doe Two and to amend her Complaint to conform to the evidence that has been adduced by discovery.

It is well settled that in federal practice, leave to amend is to be liberally granted. *Austin v. Reynolds Metals Co.*, 327 F.Supp. 1145 (E.D. Va. Va). In this case, the only amendment sought is to conform the pleadings to the evidence that has been adduced by discovery, to which Kroger was a part. The Amended Complaint, a copy of which is attached hereto as Exhibit "A," does not alter the theory upon which the plaintiff seeks to hold Kroger and/or Whitt liable for her injuries and only makes more definite the factual basis of her claim.

For the reasons hereinabove set forth, the plaintiff respectfully moves the Court for leave to substitute Calvin Whitt for John Doe Two and to file her Amended Complaint herein.

Respectfully submitted,

SYLVIA LEEDS

By Counsel

/s/ Burton L. Albert

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Counsel for Sylvia Leeds

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of June, 2010, I filed the foregoing Motion for Leave to Withdraw a Motion to Amend and Motion for Leave to Substitute Calvin Whitt for John Doe Two and to Amend with the Clerk of the Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

C. Kailani Memmer, Esq.
GUYNN, MEMMER & DILLON P.C.
415 South College Avenue
Salem, Virginia 24153
Counsel for the defendant, The Kroger Co.

Kevin J. O'Brien, Esq.
MCGUIREWOODS, LLP
One James Center
901 East Cary Street
Richmond, Virginia 23219-4030
Counsel for Calvin Whitt

/s/ Burton L. Albert
Burton L. Albert, Esq.

EXHIBIT "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Lynchburg Division

SYLVIA LEEDS	:	
	:	
Plaintiff	:	
	:	
v.	:	**Civil Action No. 6:09cv00061**
	:	
JOHN DOE TWO, *ET. AL*	:	
	:	
Defendants	:	

AMENDED COMPLAINT

The plaintiff, Sylvia Leeds, for her Amended Complaint states as follows:

Jurisdiction and Venue

1. Jurisdiction of this matter is invoked pursuant to 28 U.S.C. 1332(a), in that the amount in controversy exceeds the sum of $75,000.00, exclusive of interest and costs, and in that the plaintiff is, and was at all times material, a resident of the State of Virginia, the defendant, The Kroger Company, is, and was at all times material, a citizen of the State of Ohio; and the defendant, Calvin Whitt, is, and was at all times material, a citizen of the State of North Carolina.

2. Venue of this matter is appropriate in that the

matters complained of were committed within the jurisdiction of the Western District of Virginia.

Parties

3. At all times material, the plaintiff was an 87 year old woman who was a Virginia resident and a person who regularly frequented places of public accommodation for the purpose of purchasing grocery and related items.

4. At all times material, The Kroger Co. (hereinafter "Kroger") was an Ohio corporation authorized to do business in the State of Virginia, doing business in the City of Lynchburg, Virginia, as Kroger Store No. 408, being a super-market, a place of public accommodation which regularly invites members of the public onto its premises for the purpose of buying groceries and other related items.

5. At all time material, Calvin Whitt (hereinafter "Whitt"), was a North Carolina resident and employed by Pendum, LLC, to perform maintenance of ATM machines, including a machine located at Kroger Store No. 408 in the City of Lynchburg, Virginia.

Facts

6. On August 5, 2009, at approximately 3:30 p.m., the plaintiff was a customer of Kroger at Store No. 408 in the City of Lynchburg and as such, she was an invitee of Kroger and was owed the duty by Kroger of the use of ordinary care and prudence to render its premises reasonably safe for her visit and the duty to

protect her from injury inflicted by its employees or others present on the premises.

7. On August 5, 2009, Ashley Saunders, an employee of Kroger acting within the scope of her employment, placed a boxed patio umbrella on its end against the customer service desk in Store No. 408; the box was not secured in any fashion and the customer service counter-top was not designed for the purpose of storing an item of such large dimensions and weight.

8. At said place and time, Whitt was performing maintenance on the ATM machine located adjacent to the customer service desk and in close proximity to the boxed umbrella leaning against the desk.

9. At said place and time, the boxed patio umbrella became dislodged and fell, striking the plaintiff on her head and subsequently, as it fell to the floor, hitting her on the left side of her body.

10. No one saw the box fall, and there was no activity in proximity of the box other than Whitt's activity in working on the ATM machine.

11. Ashley Saunders, as an employee of Kroger failed to use ordinary care and prudence to protect the plaintiff from harm in that she negligently and carelessly placed a large, heavy and unstable box against the customer service desk counter-top, which was a structure not designed to store such items and was located in

close proximity to a place frequented by shoppers in Kroger, knowing or, in the exercise of reasonable care, having the duty to know that the boxed umbrella might become dislodged and fall on any customer standing at the customer service desk.

12. Kroger had the duty to avoid creating a dangerous condition that might cause harm to the plaintiff and other invitees of its store and failed in said duty by placing the box against the customer service desk.

13. In addition, Kroger had actual notice of the dangerous condition existing at the customer service desk and failed to reasonably react to said condition.

14. As a result of the negligence of Kroger, first in creating the dangerous condition and second in failing to react to the condition, the plaintiff was permanently and severely injured; she received a concussion, as a result of which she now suffers from vertigo; she received injuries to her left arm which had previously been injured in a fall and she also received injuries to her left hip which had also been previously injured in a fall.

15. Whitt had the duty, at said place and time, to exercise ordinary care to conduct his business in such a manner as to avoid injuring other persons in the vicinity of the ATM machine and, in particular, had the duty to conduct his business in and about the ATM machine in such a manner as to avoid jostling the box or the magazine rack adjacent to the box in a fashion that would

cause the box to fall and strike a Kroger customer or employee in the vicinity of the box.

16. Whitt, in violation of his duties owed to the plaintiff, negligently either struck the box or the magazine rack abutting the box with such force that the box fell and struck the plaintiff injuring her severely.

17. The plaintiff has been forced to undergo extensive medical treatment for her injuries and has been, and will in the future be, required to expend large sums of money for said treatment.

18. In addition to the foregoing, the plaintiff continues to suffer, and will suffer in the future, from vertigo and pain, has been inconvenienced and incapacitated by her injuries, was embarrassed by the incident and by the failure of Kroger to offer her any assistance of any kind whatsoever at the time of the incident and she has, and will in the future, suffer from mental anguish as a result of this incident in that Kroger re-fused to offer her a chair in which to sit, refused to call the rescue squad or any other emergency service, refused to even allow her to speak to the manager about the accident.

19. The plaintiff continues to suffer, and will suffer in the future, from emotional distress in that the injuries she suffered due to Kroger’s negligence have interfered with her ability to care for her critically ill daughter, who lives with her

and depends upon her for care.

Prayer for Relief

WHEREFORE, by reason of the foregoing, the plaintiff, Sylvia Leeds, by counsel, respectfully moves the Court for an award of damages against the defendants, The Kroger Co. and Calvin Whitt, jointly and severally, in the amount of $250,000.00 plus interest from the date of judgment and costs.

Respectfully submitted,

SYLVIA LEEDS

By: /s/ Burton L. Albert
Of Counsel

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Email: burt@balbertlaw.com
Of Counsel for the Plaintiff, Sylvia Leeds

CERTIFICATE OF SERVICE

I hereby certify that on the ___ day of _______, 2010, I filed the foregoing Amended Complaint with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

C. Kailani Memmer, Esq.
GUYNN, MEMMER & DILLON, P.C.
415 South College Avenue
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/s/ Burton L. Albert
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